



**IN THE FIRST-TIER TRIBUNAL  
GENERAL REGULATORY CHAMBER  
[INFORMATION RIGHTS]**

**Case No. EA/2013/0014**

**ON APPEAL FROM:**

**Information Commissioner's  
Decision Notice No: FS50456311  
Dated: 15 January 2013**

**Appellant: 'A'**

**First Respondent: THE INFORMATION COMMISSIONER**

**Second Respondent: THE GENERAL MEDICAL COUNCIL**

**Heard at: Social Security and Child Support Tribunal, Taunton**

**Date of hearing: 26 July 2013**

**Date of decision: 2 August 2013**

**Before  
CHRIS RYAN  
(Judge)  
and  
GARETH JONES  
JOHN RANDALL**

**Attendances:**

The Appellant appeared in person

The First Respondent did not appear and was not represented

The Second Respondent was represented by Timothy Pitt-Payne QC instructed by Ms. Toni Smerdon of the General Medical Council

**Subject matter: Duty to confirm or deny s.1(1)(a)  
Personal data s.40**

**IN THE FIRST-TIER TRIBUNAL  
GENERAL REGULATORY CHAMBER**

**Case No. EA/2013/0014**

**DECISION OF THE FIRST-TIER TRIBUNAL**

The appeal is dismissed

**REASONS FOR DECISION**

Preliminary

1. Pursuant to regulation 14(1) we have ordered that
  - a. the identity of the Appellant (to whom we refer in this decision simply as “the Appellant”, and in the case title as “A”) is not to be disclosed; and
  - b. the identity of the individual identified in this decision as “X” is not to be disclosed.

Background and Scope of the Appeal

2. On 22 December 2010 the Appellant wrote to the General Medical Council (“GMC”) regarding a complaint he had previously made against X, a medical practitioner. The GMC had decided that the complaint on its own had not raised any serious concerns that would have justified a Fitness to Practice hearing. It had determined to do no more than obtain reassurance from those for whom X said that he worked, to the effect that they had no concerns about his fitness to practise. Having done that it decided that there was no reason to proceed further with the complaint and accordingly closed the case.
3. We will refer to the letter of 22 December 2010 as “the Request Letter”.

4. The GMC treated the Request Letter as containing the following three elements:
  - a. A request for explanations of the GMC's stance on several aspects of the original complaint.
  - b. A request to be informed whether personal data of which the Appellant was the data subject was being processed by the GMC and, if so, to have that data communicated to him under section 7 of the Data Protection Act 1998 ("DPA"). We refer to this as the Subject Access Request.
  - c. A request for information held by the GMC under section 1 of the Freedom of Information Act 2000 ("FOIA"). We refer to this as the Information Request.
  
5. Until very shortly before the hearing of this appeal it appeared to have been accepted by all concerned that the Appellant had no objection to the way in which the GMC had responded to the explanations referred to in sub-paragraph 4 a. above and that the focus of the appeal should be on the first part of the Request Letter, which was in the following terms:

*"1. A full description of your consideration of my complaint against [X] including:*

*(a) The medical qualifications of all persons involved*

*(b) The procedure used to choose the personnel involved*

*(c) Copies of all records held including all correspondence both sent and received."*

However, the Appellant suggested, in response to a request for clarification of the issues to be determined at the hearing of this Appeal, that he wished the whole of his original request to be considered. We are satisfied that the scope of the area of dispute had been established well before the Information Commissioner issued the Decision Notice that has

given rise to this appeal. It would not be appropriate to consider expanding it at this stage. To be fair, the Appellant did not press us to do so during his submissions at the hearing. He also conceded that he had been provided with the information requested under paragraphs 1(a) and (b) of the Request Letter.

6. Although the Appellant asked us to consider certain criticisms about the way in which the GMC handled the Subject Access Request we do not have jurisdiction to do so, but must limit ourselves to the Information Request. However, because of the way in which each of those requests was handled it is necessary to summarise some of the events surrounding the Subject Access Request.

#### The Subject Access Request

7. DPA section 7 provides that an individual (the “data subject”) is entitled to be informed whether his or her personal data is being held or otherwise “processed” by another (the “data controller”) and, if that is so, to be given a description of that data and to have it communicated to him or her in an intelligible form. The term “personal data” is defined as data which relate to a living individual who can be identified from those data or from those data and other information which is in the possession of the data controller.
8. The GMC responded to the Subject Access Request by providing the Appellant with redacted copies of certain documents from its file on the original complaint. The disclosed documents were:
  - a. a letter to X notifying him of the complaint made against him by the Appellant, informing him that the GMC wished to seek assurance from his employers and asking him to complete a form providing their details;
  - b. a letter to X acknowledging receipt of his employer details form;

- c. a letter to X's employer notifying it of the complaint, informing it that the GMC's preliminary conclusion (that it did not raise any questions that it was minded to investigate further unless the employer had other concerns about Mr X's fitness to practise) and asking it to complete a form designed to provide information on the point;
  - d. a sample of that form;
  - e. the original complaint by the Appellant;
  - f. the GMC's decision on the complaint.
  
9. The effect of this disclosure was to provide the Appellant with substantially the whole record of the GMC's handling of the original complaint. The fact that X's name was redacted did not conceal his identity from the Appellant who, of course, knew who he was and had identified him in the Request Letter. GMC did not require the Appellant to keep the information confidential and the DPA does not impose such an obligation on those receiving information in response to a section 7 request.
  
10. In making this disclosure the GMC appears to have concluded that:
  - a. The Appellant's personal data extended to the entirety of those documents;
  - b. redacting from those document the name of X and his employers satisfied the requirement under DPA section 7(4) to protect the personal data of X; and
  - c. none of the exemptions in the DPA would have justified a refusal.
  
11. We have grave doubts as to whether the GMC was right on any of those points. On the basis of the Court of Appeal's decision on almost identical facts in *Durrant v Financial Services Authority* [2003] EWCA Civ 1746, we think it very likely that the disclosed information did not constitute the Appellant's personal data. It certainly did constitute the personal data of X, but as the Appellant had already identified him in the Information Request, it is at least arguable that disclosing redacted copies of extracts from the case file did not protect that personal data. In addition material had been left in the redacted copy correspondence that pointed strongly

towards the identity of the relevant employers. Finally, it seems at least arguable that the disclosed information constituted exempt data under DPA section 31(2)(a)(iii) – “Personal data...are exempt from the subject information provisions in any case to the extent to which the application of those provisions to the data would be likely to prejudice the proper discharge of those functions ... for protecting members of the public against...malpractice...or the unfitness or incompetence of persons authorised to carry on any profession or other activity.”

12. The, possibly over-generous, disclosure in response to the Subject Access Request has an impact on our assessment of the GMC’s handling of the Information Request. We will turn to that now.

#### The Information Request

13. As a preliminary point, we were invited by the Information Commissioner to conclude that we had no jurisdiction over the Appellant’s complaint about the handling of the Information Request. This was based on the argument that, as the Appellant’s complaint to the Information Commissioner had covered only the issue of the GMC’s delay in responding to the Information Request, the Information Commissioner had been entitled to consider only that issue in his Decision Notice. It was very clear to us from reading the complaint document itself, as well as subsequent correspondence clarifying the scope of the complaint, that there was no basis in fact for the stance which the Information Commissioner chose to adopt. He seemed at one stage to be suggesting in his written submissions (he decided not to attend the hearing in order to debate his contentions) that, even if he was wrong in his interpretation of the scope of the complaint, we did not have jurisdiction to consider the point because it did not feature in his Decision Notice. If that is what was being contended then we firmly reject it. If the Information Commissioner issues a decision notice that fails to deal with part of the complaint referred to him then the omission leads to a Decision Notice that is not in accordance with the law for the purposes of FOIA section 58(1), on which the jurisdiction of this Tribunal is founded. We

hope that we have, in fact, misunderstood the submission as it would be a rather strange derogation of the Information Commissioner's functions, (as set out in FOIA section 47), for him to have argued that his own error should have the effect of denying an individual's information rights.

14. To the extent that the Information Request sought information that was not the Appellant's personal data, it fell within the scope of FOIA section 1(1)(a), which imposes on any public authority to whom it applies an obligation to state whether or not it holds requested information. However, if the information is categorised as "exempt information" under one or more of the statutory provisions set out in Part II of FOIA, the duty to confirm or deny may not apply to that information. The exemptions are categorised as either absolute or qualified. If absolute the "neither confirm nor deny" response may be given without further enquiry. However, if the exemption is a qualified one, a "neither confirm nor deny" response may only be given if, pursuant to FOIA section 2(1)(b):

*"in all the circumstances of the case the public interest in maintaining the exclusion of the duty to confirm or deny outweighs the public interest in disclosing whether the public authority holds the information."*

15. The GMC's response to the FOIA aspect of the Request Letter was to assert that it was entitled to issue a "neither confirm nor deny" response on the basis that the information requested fell within the exemption set out in FOIA section 40, and in particular section 40(5)(b)(i).

16. FOIA section 40(2) provides that information is exempt information if it constitutes personal data of a third party the disclosure of which would contravene any of the data protection principles.

17. Personal data is itself defined in section 1 of the Data Protection Act 1998 ("DPA") which provides:

*“personal data’ means data which relate to a living individual who can be identified-*

*(a) from those data, or*

*(b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller”*

We are satisfied that information about a complaint made to the disciplinary panel of a profession constitutes the personal data of the individual against whom a complaint is made.

18. The data protection principles are set out in Part 1 of Schedule 1 to the DPA. The only one having application to the facts of this Appeal is the first data protection principle. It reads:

*“Personal data shall be processed fairly and lawfully, and in particular shall not be processed unless-*

*(a) at least one of the conditions in Schedule 2 is met ...”*

Schedule 2 then sets out a number of conditions, but only one is relevant to the facts of this case. It is found in paragraph 6(1) and reads:

*“The processing is necessary for the purposes of legitimate interests pursued by the data controller or by the third party or parties to whom the data are disclosed, except where the processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject.”*

19. FOIA section 40(5) provides:

*“The duty to confirm or deny –*

*(a)*

*(b) does not arise in relation to ...information if or to the extent that*

*...”*



*(i) the giving to a member of the public of the confirmation or denial that would have to be given to comply with section 1(1)(a) would (apart from this Act) contravene any of the data protection principles ....”*

20. Counsel for the GMC argued that giving a confirmation or denial response to the Information Request would have constituted unfair processing. It would have constituted an unwarranted interference into X’s privacy, which could not be regarded as being “necessary” in order to serve a legitimate interest in the public knowing whether or not a complaint had been made against X. The Appellant’s case was that the GMC was wrong because (i) the unredacted content of the materials identified in paragraph 8 above did not constitute the personal data of anyone (other than himself), and/or (ii) if it did, the public confirmation or denial that it held that information would not breach any part of the data protection principles.

21. We have no doubt that a medical practitioner is entitled to privacy over a complaint made against him that is not considered to have sufficient merit to justify being put before the relevant disciplinary panel. He is entitled, also, to retain privacy over the identity of the organisation or organisations which employ him and from whom confirmation is sought that the complaint does not form part of a pattern which, viewed overall, might merit further investigation. The Appellant suggested that, in this case, the privacy of rights of X were diluted, to a degree that would tip the balance in favour of requiring a confirmation or denial, by two factors. First, the Appellant suggested that X may not have disclosed all the employers to whom the GMC should write. However, the Appellant produced no evidence to support what he articulated as no more than a suspicion and we do not consider that this justifies any undermining of the expectation of privacy that might normally be expected to apply. Secondly, the Appellant pointed out that certain elements of the GMC’s own publication “Good Medical Practice” suggested that medical practitioners were required to disclose more information than might otherwise be appropriate and to act with greater openness and honesty towards the public than would be the

norm. We reviewed the material carefully but concluded that it did not come near to requiring a medical practitioner to expect that publicity would be given to the existence of any complaint that did not progress beyond the initial stage we have described.

22. We were troubled by a third factor, to which we have already referred.

This is that much of the information about the GMC's handling of the complaint against X had already been disclosed in response to the Subject Access Request. Counsel for the GMC distinguished between an individual's right to receive his own personal data (exercised in this case by the Subject Access Request) and the possibility that a FOIA request might lead to disclosure to the public at large, provided this did not lead to a breach of the data protection principles. He stressed that the two types of disclosure arose from different legal regimes, which created fundamentally different tests and that, although no express obligation of confidentiality was imposed on a person receiving information under a subject access request, he or she nevertheless assumed at that stage the role of Data Controller, with the concomitant obligations to process the received data in accordance with the data protection principles. The result, he said, was that, even if the GMC had been too generous in the quantity of information disclosed in response to the Subject Access Request (which he did not admit), that would not alter the reasonable expectation of either doctors as a whole, or X in particular, as to the level of protection from disclosure to the public at large in response to a FOIA request. That expectation was based, counsel said, on the GMC's published policy in respect of complaint cases that are closed at the preliminary stage. It was not undermined by any action that may have been taken in response to a particular subject access request.

23. We remain troubled by this point. On the facts of this particular case it leads to the strange conclusion that the GMC may maintain a "neither confirm nor deny" response in order to preserve secrecy over whether or not a complaint against X was investigated, in circumstances where the person making the request was fully aware, not only that there was a

complaint but that it was pursued by the GMC in a particular manner and closed at a particular stage. However, we acknowledge that there is some strength in the arguments put by the GMC's counsel and recognise the value of maintaining the policy which the GMC has established, even when its own actions had tended to undermine it. We accordingly conclude that the GMC was entitled to issue a "neither confirm nor deny" response to the Information Request.

#### Additional Issues

24. The GMC did not deal promptly with either the Subject Access Request or the Information Request. For reasons given we have not considered the delay in respect of the Subject Access Request. As to the Information Request the Decision Notice on which this appeal is based determined that the GMC had breached FOIA section 10 by failing to comply with its obligations under FOIA section 1(1) by no later than the twentieth working day following the date of receipt of a request for information. The GMC did not appeal that decision. Nevertheless, the Appellant raised a number of challenges as to the detailed findings of fact that underlay the decision and invited us to conclude, among other things, that the delays had been greater even than the Decision Notice indicated and that the GMC had falsely claimed to have sent a particular letter, which had not in fact ever been despatched. We do not need to decide these issues, even if it were possible, at this stage and on the basis of the limited evidence before us, to do so. The Information Commissioner reached a decision on the point, which was not appealed. The role given to this Tribunal, under FOIA section 58, is to determine whether or not the decision notice under appeal was in accordance with the law. None of the Appellant's detailed criticisms of the factual analysis undertaken by the Information Commissioner would support an argument that his conclusion was not in accordance with the law, even if his overall conclusion had been appealed. We therefore have neither reason nor jurisdiction to determine the points raised.

25. The Appellant also argued that the GMC had been in breach of the FOIA in the manner in which it had dealt with the provision to him of certain fact sheets. It was common ground that copies of these documents had ultimately been sent to the Appellant and, as the Decision Notice decided that the GMC had been guilty of delay (a decision that has not been appealed), we do not think that the Appellant's complaint raised an issue that fell to be determined. It would be a disproportionate use of resources for us to undertake a detailed factual investigation about the precise timing of the delivery to the Appellants of documents which seemed, in any event, to have already been made publicly available by the GMC.

26. Our decision is unanimous

**Chris Ryan**  
Judge

2 August 2013